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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ERIC ANGEL THOMAS,) Civil No. 07cv2257-IEG (BLM)
12)
13) Petitioner,)
14) **REPORT AND RECOMMENDATION FOR**
15) **ORDER DENYING PETITION FOR**
16) **WRIT OF HABEAS CORPUS**
17)
18) v.)
19)
20) M.C. KRAMER, Warden,)
21)
22) Respondent.)
23)
24)
25)
26)
27)
28)

17 This Report and Recommendation is submitted to United States
18 District Judge Irma E. Gonzalez pursuant to 28 U.S.C. § 636(b) and
19 Local Civil Rules 72.1(d) and HC.2 of the United States District
20 Court for the Southern District of California.

21 On November 29, 2007, Petitioner Eric Angel Thomas, a state
22 prisoner, commenced these habeas corpus proceedings pursuant to 28
23 U.S.C. § 2254. Doc. No. 1. Petitioner challenges his convictions
24 for selling cocaine base and possessing cocaine base for sale.

25 This Court has considered the Petition ("Pet."), Respondent's
26 Answer, Petitioner's Traverse, and all supporting documents
27 submitted by the parties. For the reasons set forth below, this
28 Court **RECOMMENDS** that Petitioner's Petition for Writ of Habeas

Corpus be **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the California Court of Appeal's opinion on direct review in People v. Thomas, No. D049171, slip op. (Cal. Ct. App. April 17, 2007). Lodgment 2. This Court presumes the state court's factual determinations to be correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); see also Parke v. Raley, 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences properly drawn from such facts, are entitled to statutory presumption of correctness).

Detective Roberto Lemus was working as part of a narcotics team when he approached Carla Poole in a known narcotics trafficking area. Lemus asked her if she knew from whom he could buy narcotics, and Poole responded that she would help him find a dealer. Lemus gave Poole a prerecorded \$20 bill. Poole walked across the street and spoke to Eric Thomas, who walked to the front of a nearby hotel and took something out of a planter box. He then placed something back in the planter box. Thomas walked back to Poole and handed her something, allegedly rock cocaine, and Poole gave Thomas something, allegedly the prerecorded \$20 bill, in return. Poole walked back to Lemus and handed him .13 grams of cocaine base. Lemus gave the "bust signal," and uniformed officers arrested Poole and Thomas.

The officers searched Poole and found nothing. The officers searched Thomas and found the prerecorded \$20 bill, .18 grams cocaine base, and an additional \$251 in cash.

Officer Robert Stinton searched a planter box near where Thomas was arrested and found .81 grams of cocaine base. He did not search the planter box from which Thomas allegedly obtained the cocaine he gave to Poole.

Lodgment 2 at 2.

On July 12, 2006, a jury convicted Petitioner of the crimes of selling cocaine base and possessing cocaine base for sale in

1 violation of California Health and Safety Code §§ 11352(a) and
2 11351.5. Lodgment 1 at 31-32. The jury also found true the
3 allegations that Petitioner had served a prior person term and
4 suffered a prior violent felony conviction as set forth in
5 California Penal Code §§ 667.5(b), 667(b)-(i) and 1170.12. Id. at
6 75-76. The court sentenced Petitioner to a total of nine years'
7 imprisonment. Id. at 90-91; Lodgment 2 at 3.

8 Petitioner appealed his conviction and sentence and, on April
9 17, 2007, the appellate court affirmed. Lodgment 2. The court
10 upheld the trial court's decision not to dismiss Petitioner's prior
11 felony conviction allegation. Id. at 3-4. The court also found
12 that there was substantial evidence supporting Petitioner's
13 conviction for possession of cocaine base for sale. Id. at 4-5.

14 On June 11, 2007, Petitioner filed a Petition for Writ of
15 Habeas Corpus in the California Supreme Court asserting two claims,
16 "ineffective assistance of counsel" and "violation of due process of
17 law." Lodgment 3. On October 31, 2007, the California Supreme
18 Court summarily denied the petition, citing to In re Swain, 34
19 Cal.2d 300, 304 (1949) and People v. Duvall, 9 Cal.4th 464, 474
20 (1995). Lodgment 4.

21 STANDARD OF REVIEW

22 Title 28 of the United States Code, section 2254(a), sets
23 forth the following scope of review for federal habeas corpus
24 claims:

25 The Supreme Court, a Justice thereof, a circuit judge,
26 or a district court shall entertain an application for
27 a writ of habeas corpus in behalf of a person in
28 custody pursuant to the judgment of a State court only
on the ground that he is in custody in violation of
the Constitution or laws or treaties of the United
States.

1 28 U.S.C. § 2254(a).

2 The Petition was filed after enactment of the Anti-terrorism
3 and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-
4 132, 110 Stat. 1214. Under 28 U.S.C. § 2254(d), as amended by
5 AEDPA:

6 (d) An application for a writ of habeas corpus on
7 behalf of a person in custody pursuant to the judgment
8 of a State court shall not be granted with respect to
9 any claim that was adjudicated on the merits in State
court proceedings unless the adjudication of the
claim—

10 (1) resulted in a decision that was contrary to,
11 or involved an unreasonable application of, clearly
established Federal law, as determined by the Supreme
Court of the United States; or

12 (2) resulted in a decision that was based on an
13 unreasonable determination of the facts in light of
the evidence presented in the State court proceeding.

14 28 U.S.C. § 2254(d). A summary denial constitutes an adjudication
15 on the merits. See Luna v. Cambra, 306 F.3d 954, 960 (9th Cir.
16 2002). Where there is no reasoned decision from the state's highest
17 court, the Court "looks through" to the analysis provided by the
18 underlying appellate court decision. Ylst v. Nunnemaker, 501 U.S.
19 797, 801-06 (1991).

20 A state court's decision is "contrary to" clearly established
21 federal law if the state court: (1) "arrives at a conclusion
22 opposite to that reached" by the Supreme Court on a question of law;
23 or (2) "confronts facts that are materially indistinguishable from
24 a relevant Supreme Court precedent and arrives at a result opposite
25 to [the Supreme Court's]." Williams v. Taylor, 529 U.S. 362, 405
26 (2000).

27 A state court's decision is an "unreasonable application" of
28

1 clearly established federal law where the state court "identifies
2 the correct governing legal principle from this Court's decisions
3 but unreasonably applies that principle to the facts of the
4 prisoner's case." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003).
5 "[A] federal habeas court may not issue a writ simply because the
6 court concludes in its independent judgment that the relevant state-
7 court decision applied clearly established federal law erroneously
8 or incorrectly Rather, that application must be *objectively*
9 *unreasonable*." Andrade, 538 U.S. at 75-76 (emphasis added)
10 (internal quotation marks and citations omitted). Clearly
11 established federal law "refers to the holdings, as opposed to the
12 dicta, of [the United States Supreme] Court's decisions." Williams,
13 529 U.S. at 412.

14 Finally, habeas relief also is available if the state court's
15 adjudication of a claim "resulted in a decision that was based on an
16 unreasonable determination of the facts in light of the evidence
17 presented in state court." 28 U.S.C. § 2254(d)(2). A state court's
18 decision will not be overturned on factual grounds unless this Court
19 finds that the state court's factual determinations were objectively
20 unreasonable in light of the evidence presented in the state court
21 proceeding. See Miller-El, 537 U.S. at 340; see also Rice v.
22 Collins, 546 U.S. 333, 341-42 (2006) (the fact that "[r]easonable
23 minds reviewing the record might disagree" does not render a
24 decision objectively unreasonable). This Court will presume that
25 the state court's factual findings are correct, and Petitioner may
26 overcome that presumption only by clear and convincing evidence. 28
27 U.S.C. § 2254(e)(1).

28

DISCUSSION

Petitioner raises one claim in his federal petition. Pet. In this claim, Petitioner alleges that his due process and Sixth Amendment rights were violated when he was forced to be represented by a court-appointed attorney. Id. at 6-8. Petitioner initially argues that his rights were violated because he did not consent in writing to the representation. Id. at 6. Petitioner also asserts that the trial judge violated his constitutional rights when he refused to continue the preliminary hearing and trial to permit Petitioner to locate and hire a new attorney. Id. at 6-8. Finally, Petitioner alleges that the failure to appoint a new lawyer violated his constitutional rights because there was an inherent conflict when his attorney "was selected by the same agency responsible for [his] prosecution" and/or an actual conflict due to the "apparent lack of communication" between Petitioner and his attorney. Id.

Respondent counters that the Petition should be denied because Petitioner did not fairly present his claim to the California Supreme Court and that, therefore, his claim is unexhausted. Answer at 5-9. Respondent also contends that the California Supreme Court denied Petitioner's petition on state procedural grounds, and that the petition is thus procedurally defaulted. Id. at 9. Finally, Respondent argues that the Petition should be denied because the state court's decision was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law. Id. at 9-14.

In his traverse, Petitioner does not address the procedural default allegation but argues that his claim is exhausted and that the trial court violated his constitutional rights. Traverse.

1 **A. Exhaustion**

2 The exhaustion of available state judicial remedies is a
 3 prerequisite to a federal court's consideration of claims presented
 4 in habeas corpus proceedings. 28 U.S.C. § 2254(b); see Rose v.
 5 Lundy, 455 U.S. 509, 522 (1982); McQueary v. Blodgett, 924 F.2d 829,
 6 833 (9th Cir. 1991). Exhaustion of a habeas petitioner's federal
 7 claims requires that they have been "fairly presented" in each
 8 appropriate state court, including a state supreme court with powers
 9 of discretionary review. Baldwin v. Reese, 541 U.S. 27, 29 (2004).
 10 However, claims are not exhausted by mere presentation to the state
 11 appellate system. A petitioner also must "alert[] [the state] court
 12 to the federal nature of the claim." Id. at 29. A petitioner may
 13 indicate a federal claim by citing the source of federal law upon
 14 which he relies, or by merely labeling the claim as "federal." Id.
 15 at 32.¹

16 In his federal habeas petition, Petitioner asserts a due
 17 process violation and incorporates a constitutional right to
 18 counsel. Pet.; Traverse. In support, he alleges numerous factual
 19 predicates including an alleged lack of written consent to counsel's
 20 representation, the trial court violation of Petitioner's right to
 21 choose a lawyer, the lack of communication between counsel and
 22 Petitioner, and the trial court's failure to continue the
 23 preliminary hearing to permit him to obtain new counsel. Pet.;

24
 25 ¹ Though federal courts have not been entirely consistent in specifying
 26 the quantum of federal authority a habeas petitioner must present to the state
 27 court, the Supreme Court's decision in Baldwin implies that a relatively
 28 undeveloped reference to federal principles suffices. But see, Gray v.
Netherland, 518 U.S. 152, 162-63 (1996) (unelaborated appeals to broad
 constitutional principles insufficient to alert state court to particularized
 federal claims); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing
Gray v. Netherland).

1 Traverse. In Claim 1 of his state habeas petition, Petitioner also
2 asserts an ineffective assistance of counsel claim. Pet. In this
3 claim, he alleges not only that his attorney was not adequately
4 prepared, but also that his Sixth Amendment right to counsel was
5 violated when the court refused to permit him to be represented by
6 an attorney of his choice and permitted his court-appointed attorney
7 to represent him, even though he had not signed a written consent
8 form and there was an "obvious break-down of communication" between
9 Petitioner and his attorney. Lodgment 3 at 4.

10 Respondent argues that Petitioner did not fairly present his
11 federal claim to the California Supreme Court because the federal
12 claim involves a Sixth Amendment right to counsel, including the
13 right to choose his own attorney, whereas the state claim was simply
14 an ineffective assistance of counsel claim. Answer at 8. While
15 Respondent is correct that there are differences between the two
16 claims, Respondent construes the claims too narrowly. Both claims
17 allege a violation of Petitioner's Sixth Amendment right to counsel
18 by the trial court's insistence that Petitioner proceed to trial
19 with the court-appointed attorney, without a signed consent form,
20 and despite the alleged break-down in communication. This Court
21 must liberally construe pleadings by *pro se* litigants, see Haines v.
22 Kerner, 404 U.S. 519, 520 (1972) (instructing that courts must
23 construe *pro se* habeas filings liberally) and Allen v. Calderon, 408
24 F.3d 1150, 1153 (9th Cir. 2005) (same), and in light of this fact,
25 the Court finds that the federal claim is exhausted. Accordingly,
26 this Court **RECOMMENDS** that Petitioner's claim not be denied on this
27 basis.

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1 **B. Procedural Default**

2 A habeas petition is procedurally defaulted when the last
 3 reviewing state court dismissed it for failure to comply with a
 4 state rule of procedure. Trest v. Cain, 522 U.S. 87 (1997);
 5 Lambright v. Stewart, 241 F.3d 1201, 1205 (9th Cir. 2001). When the
 6 procedural rule is independent of federal law and adequate to
 7 support the judgment, federal review of the claims is barred unless
 8 the petitioner can demonstrate either cause for the default and
 9 actual prejudice resulting from the alleged constitutional
 10 violations, or that failure to consider the claims will result in a
 11 fundamental miscarriage of justice. Carter v. Giurbino, 385 F.3d
 12 1194, 1196-97 (9th Cir. 2004) (citing Coleman v. Thompson, 501 U.S.
 13 722, 750 (1991)). Procedural default is an affirmative defense, and
 14 once the respondent has adequately pled the existence of independent
 15 and adequate state procedural grounds, the burden to place that
 16 defense in issue shifts to the petitioner. Bennett v. Mueller, 322
 17 F.3d 573, 586 (9th Cir. 2003).

18 1. **The Duvall/Swain Denial Constitutes an "Independent and**
 19 **Adequate" State Procedural Ground Upon Which the**
 California Supreme Court "Actually Relied"

20 The last court to review Petitioner's claims was the
 21 California Supreme Court, which issued a one-sentence denial of the
 22 petition, citing In re Swain, 34 Cal.2d 300, 304 (1949), and People
 23 v. Duvall, 9 Cal.4th 464, 474 (1995). Lodgment 4; see Carter, 385
 24 F.3d at 1197 (one-sentence summary denial of petition incorporating
 25 unelaborated case citation sufficient for procedural default).
 26 Petitioner's claim is thus procedurally defaulted if this citation
 27 is an "independent and adequate" state procedural ground upon which
 28 the California Supreme Court "actually relied." Valerio v. Crawford,

1 306 F.3d 742, 773 (9th Cir. 2002) (en banc).

2 A state court's denial is not independent when it "appeared
3 to rest primarily on resolution of [the petitioner's federal]
4 claims, or to be interwoven with those claims." Coleman, 501 U.S.
5 at 735; Park v. California, 202 F.3d 1146, 1151 (9th Cir. 2000)
6 (citing Coleman, 501 U.S. at 733). Here, the California Supreme
7 Court cited to page 474 of its previous holding in Duvall.²
8 Lodgment 4. This portion of Duvall describes a habeas petitioner's
9 duty under California law to "state fully and with particularity the
10 facts on which relief is sought," and "include copies of reasonably
11 available documentary evidence supporting the claim." Duvall, 9
12 Cal.4th at 474; see King v. Roe, 340 F.3d 821, 823 (9th Cir. 2003)
13 (recognizing Duvall page 474 as requiring petitioner to plead with
14 particularity). This requirement is described in depth, and, though
15 page 474 contains numerous citations to California authorities,
16 there are none to federal law. Id.

17 The cited portions of Duvall and Swain describe a California
18 procedural rule and do not rely on federal law or cases. In denying
19 Petitioner's claims, the state supreme court relied exclusively on
20 these citations. Lodgment 4. Accordingly, the state court's denial
21 in this case was "independent" of federal law. See Carter, 385 F.3d
22 at 1197 (denial independent when "[n]o analysis of federal law
23 enters into the [] equation"); Valerio, 306 F.3d at 775-76 (habeas
24 petition procedurally defaulted when state court clearly and

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26 ² The California Supreme Court also cited to page 304 of its prior
27 decision in Swain. On that page, the Swain Court held that "vague, conclusionary
28 allegations" are "insufficient to warrant issuance of the writ." Swain, 34
Cal.2d at 304. The court also held that this requirement is a procedural hurdle
and not a decision on the merits. Id. In reaching its decision, the Duvall
court cited the Swain decision. Duvall, 9 Cal.4th at 474.

1 expressly relied on state law).

2 To be procedurally defaulted, a petitioner's claims also must
3 be denied on "adequate" grounds. "A state procedural rule
4 constitutes an adequate bar to federal court review if it was
5 'firmly established and regularly followed' at the time it was
6 applied by the state court." Poland v. Stewart, 169 F.3d 573, 585
7 (9th Cir. 1999) (quoting Ford v. Georgia, 498 U.S. 411, 425 (1985)).
8 The burden of proving adequacy is upon the state, and if the state
9 does so, then the burden shifts to the petitioner to assert
10 "specific factual allegations that demonstrate the inadequacy of the
11 state procedure, including citation to authority demonstrating
12 inconsistent application of the rule." Bennett, 322 F.3d at 585-86.

13 When describing a habeas petitioner's duty to plead with
14 particularity and support his claims with documentary evidence, the
15 Duval court summarized a long-standing rule, citing a series of
16 cases, including Swain, dating from the 1920's to the 1990's, when
17 the opinion was written. Duval, 9 Cal.4th at 474. Since then,
18 California appellate courts have continued to affirm the Duval
19 requirements. See, e.g., In re Hawthorne, 35 Cal. 4th 40 (2005); In
20 re Seaton, 34 Cal. 4th 193 (2004). Likewise, the Ninth Circuit has
21 followed the California Courts, citing Duval page 474 as requiring
22 pleading with particularity and supporting documentary evidence.
23 See, e.g., Griffey v. Lindsey, 345 F.3d 1058, 1066 n.11 (9th Cir.
24 2003) (vacated on other grounds as moot); King, 340 F.3d 823; see
25 also Jones v. Woodford, 2008 WL 505230 at *36, 03cv1463-J (RBB)
26 (S.D. Cal. 2008). These requirements are thus well-established,
27 have been consistently applied for the better part of a century, and
28 were firmly in place when Petitioner submitted his state supreme

1 court petition in 2007. See Carter, 385 F.3d at 1198 (California
2 procedural rule dating back to 1947 as independent and adequate
3 procedural bar to federal review); Poland, 169 F.3d at 583-85 (state
4 rule adequate when "consistently and regularly followed").

5 The burden therefore shifts to Petitioner to prove that the
6 Duwall rules were not firmly established and regularly followed at
7 the time the California Supreme Court denied his petition. Bennett,
8 322 F.3d at 585-86. Petitioner fails to make any arguments in this
9 respect, much less support his burden with "specific factual
10 allegations." Id. Moreover, the Court's independent review of the
11 law found no support for such an argument. Petitioner thus fails to
12 show that the state supreme court's citation to Duwall and Swain
13 constituted anything but an adequate ground upon which to deny his
14 claims.

15 The California Supreme Court also must have "actually relied"
16 on the Duwall/Swain rule in its denial of Petitioner's petition.
17 Valerio, 306 F.3d at 773. As Duwall and Swain were the only cases
18 cited and both provide the same rationale, the supreme court
19 necessarily and actually relied on that holding.

20 For the above reasons, the California Supreme Court's
21 citation to Duwall and Swain constituted "actual reliance" on an
22 "independent and adequate" procedural rule. Petitioner's claims are
23 therefore procedurally defaulted.

24 **2. As Petitioner Neither Suffered Cause and Prejudice, Nor**
25 **Argues Actual Innocence, His Claims are Procedurally**
Defaulted

26 To overcome procedural default, Petitioner must demonstrate
27 either cause for his default and prejudice resulting from the
28 alleged constitutional violations, or that he is actually innocent,

1 such that a failure to consider his claims will result in a
2 fundamental miscarriage of justice. Coleman, 501 U.S. at 750
3 (standard based on "the important interest in finality" served by
4 state procedural rules and the "significant harm ... that results
5 from the failure of federal courts to respect them"); Boyd v.
6 Thompson, 147 F.3d 1124, 1126 (9th Cir. 1998). Petitioner does not
7 meet this burden.

8 "[C]ause' under the cause and prejudice test must be
9 something *external* to the petitioner, something that cannot fairly
10 be attributed to him," Coleman, 501 U.S. at 753 (emphasis in
11 original), while prejudice is that resulting from the alleged
12 constitutional errors, id. at 750. Unless a petitioner demonstrates
13 excusable cause for his procedural default, a reviewing federal
14 court need not reach the question of prejudice. Engle v. Isaac, 456
15 U.S. 107, 134 (1982); Smith v. Baldwin, 510 F.3d 1127, 1147 (9th
16 Cir. 2007). Petitioner must therefore make an initial showing that
17 external factors caused his failures to plead with particularity and
18 support his claims with documentary evidence.

19 In the instant case, Petitioner does not identify any
20 factors, external or otherwise, that caused him to fail to plead his
21 state claims with particularity. Pet.; Traverse. Rather, Petitioner
22 merely reargues his allegations that his constitutional rights were
23 violated. Id. The Court's own review of the lodgments and
24 pleadings does not reveal any external factors that caused
25 Petitioner's failure to plead with particularity. Accordingly,
26 Petitioner has not established cause for his procedural default.
27 See Murray v. Carrier, 477 U.S. at 488; Davis v. Woodford, 384 F.3d
28 628 (9th Cir. 2004) (petitioner must offer explanation for

1 procedural default). Because Petitioner has not established cause,
2 the Court need not address the question of prejudice. Engle, 456
3 U.S. at 134; Smith, 510 F.3d at 1147.

4 The Court, therefore, may only reach the merits of
5 Petitioner's habeas claims if, "in light of new evidence, 'it is
6 more likely than not that no reasonable juror would have found
7 petitioner guilty beyond a reasonable doubt,'" and whose continued
8 incarceration would therefore constitute a "miscarriage of justice."
9 House v. Bell, 547 U.S. 518, 519, 536 (2006) (citing Schlup v. Delo,
10 513 U.S. 298, 324, 327 (1995)). Petitioner has presented no such
11 evidence here, nor does he argue that he is actually innocent of the
12 crimes of which he was convicted. The miscarriage of justice
13 exception to procedural default is therefore inapplicable to this
14 case.

15 In sum, Duvall and Swain provide independent and adequate
16 state procedural grounds for the California Supreme Court's denial
17 of Petitioner's claims. As Petitioner neither demonstrates cause
18 for his procedural default, nor contends actual innocence, a
19 reviewing federal court may not look beyond the default to the
20 merits of the petition. Accordingly, this Court **RECOMMENDS** denying
21 Petitioner's claim on this ground.

22 **C. Sixth Amendment Right to Counsel**

23 Respondent's final argument is that the Petition should be
24 denied on the merits because Petitioner does not have a federal
25 right to counsel of his choice. Answer at 9-14.

26 Petitioner argues that the trial court violated his due
27 process and Sixth Amendment rights by (1) permitting his court-
28 appointed attorney to represent him even though Petitioner had not

1 signed a written consent, (2) not continuing the preliminary hearing
2 and trial in order to permit Petitioner to retain counsel of his
3 choice, and (3) not appointing a new lawyer to represent Petitioner
4 due to the inherent conflict and/or break-down in communication
5 between Petitioner and his lawyer. Pet. at 6-8; Traverse at 2-6.

6 To the extent Petitioner presented these arguments or this
7 claim to a state court, he did so in his habeas petition to the
8 California Supreme Court. Lodgment 3. Because that court summarily
9 denied the petition (Lodgment 4) and Petitioner did not present the
10 argument to any other court, this Court must conduct a de novo
11 review. Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)
12 (independent review appropriate when state court reaches merits of
13 a specific claim without providing reasoning).

14 **1. Facts Pertaining to Legal Representation**

15 On March 10, 2006, Petitioner appeared in court, was
16 arraigned on the charges filed against him, and requested appointed
17 counsel. Lodgment 1 at 92 (amended minute order). The judge
18 granted Petitioner's request and appointed the public defender to
19 represent him. Id. The court scheduled the preliminary hearing
20 for March 22, 2006. Id. On March 22, 2006, the public defender
21 notified the court of a conflict of interest in representing
22 Petitioner. Lodgment 1 at 94 (minute order). The Court appointed
23 an attorney from the Private Conflicts Counsel ("PCC"), set a
24 readiness hearing for April 3, and a preliminary examination for
25 April 5. Id.

26 On April 3, 2006, Petitioner advised the court that he wanted
27 a new attorney. Lodgment 1 at 95; Pet. at 9-12. The judge excused
28 government counsel and the public and conducted an *in camera* hearing

1 with Petitioner and his lawyer. Id. Petitioner told the court that
2 he did not have an individual objection to PCC attorney, Gary
3 Edwards, or to the representation provided by Mr. Edwards, stating
4 "[i]t's nothing personal. It's just the position he's in. He is
5 appointed by the courts." Pet. at 10-11. Petitioner explained that
6 "any court-appointed attorney will be an automatic conflict of
7 interest because of obligation to the court come before representing
8 me fully as a client in my constitutional rights." Pet. at 10. The
9 judge explained to Petitioner that all non-retained lawyers are
10 appointed and paid for by the courts. Id. at 11. Petitioner
11 responded that he wanted to hire a lawyer but admitted that he had
12 not taken any specific action to do so. Id. Based upon this
13 exchange, the court confirmed the preliminary hearing date but
14 stated that Petitioner could hire an attorney if he desired to do
15 so. Id. at 12.

16 On April 5, 2006, Petitioner's lawyer advised the judge that
17 Petitioner wanted to address the court and request another attorney.
18 Lodgment 5 at 1. Petitioner apparently provided the court with a
19 written request for a two-week extension of the preliminary hearing.
20 Id. at 2. Petitioner explained to the judge that he wanted to hire
21 an attorney but admitted that he still had not taken any concrete
22 actions to do so. Id. at 2-3. Based upon this record and the April
23 3 hearing, the judge denied Petitioner's request for a continuance
24 and stated that the preliminary hearing would proceed that day and
25 the PCC attorney would represent Petitioner. Id. at 3-4.
26 Petitioner vehemently objected, citing the denial of his
27 constitutional rights. Id. at 4. The judge began the plea colloquy
28 with Petitioner's co-defendant, Gakarla Poole. Id. at 5. A few

1 minutes later, Petitioner became verbally abusive and repeatedly
2 demanded to be removed from the courtroom. Id. at 6-7. The judge
3 ordered the deputies to gag Petitioner. Id. at 7.

4 After accepting Ms. Poole's guilty plea, the judge ordered
5 Petitioner returned to the courtroom.³ Id. at 12. The judge
6 explained to Petitioner that he had a right to be present during the
7 preliminary hearing but that the right can be forfeited by
8 inappropriate conduct, such as the conduct Petitioner previously
9 displayed. Id. Using inflammatory and abusive language, Petitioner
10 told the judge that the judge was violating Petitioner's rights by
11 forcing him to be represented by his PCC lawyer and demanded to be
12 removed from the courtroom. Id. at 12-13. The judge instructed the
13 bailiff to remove Petitioner and proceeded with the preliminary
14 hearing without him. Id. at 13. At the conclusion of the hearing,
15 the court found probable cause to believe that Petitioner committed
16 the offenses charged in the complaint. Id. at 30.

17 On June 8, 2006, Petitioner appeared before a new judge for
18 trial. Lodgment 6. At the beginning of the proceeding, Petitioner
19 told the judge that he had filed a motion and wanted to dismiss his
20 PCC attorney and "be referred to the indigent panel." Id. at 54-56.
21 The judge excluded the prosecutor and conducted another *in camera*
22 hearing with Petitioner and his attorney. Id. at 56. Petitioner
23 explained that he did not want to be represented by the PCC lawyer
24 because he is court-appointed so his loyalty is to the government,

25
26 ³ The record does not indicate whether Petitioner actually was removed
27 from the courtroom. The judge instructed the deputies to gag Petitioner after
28 Petitioner repeatedly swore at the judge. Lodgment 5 at 7. However, the judge
did not order Petitioner removed from the courtroom and Petitioner made a comment
during his co-defendant's guilty plea. Id. After the guilty plea, however, the
judge told Petitioner that he had Petitioner "brought back" for an additional
discussion. Id. at 12.

1 rather than to Petitioner, and because he has not discussed
2 Petitioner's case with him. Id. 57-58. Gary Edwards, the PCC
3 lawyer responded that Petitioner had threatened him during the
4 preliminary hearing and had refused to meet with him, talk to him,
5 or return his phone calls after the hearing. Id. at 58-60.
6 However, Mr. Edwards confirmed that he was familiar with the facts
7 of the case and ready to proceed with trial. Id. at 59. The judge
8 then clarified with Petitioner that Petitioner's real dispute was
9 with any lawyer appointed by the court and paid by the government,
10 rather than the individual PCC lawyer, and that he was not objecting
11 specifically to representation by Mr. Edwards. Id. at 61. In
12 response, the judge carefully explained the criminal defense system
13 to Petitioner and attempted to find a solution to Petitioner's
14 representation concerns, which would permit the case to proceed to
15 resolution. Id. at 61-68. Petitioner again became verbally abusive
16 and demanded to be removed from the courtroom. Id. at 65-69. The
17 judge advised Petitioner that he could be removed from the courtroom
18 if he so desired, but the trial would proceed without him. Id. at
19 68-69. Finally, the judge asked Petitioner if he "would like to be
20 present?" and Petitioner replied "No, I won't be present. I am not
21 going to be represented by this PCC man." Id. at 69. The judge
22 then directed that Petitioner be removed from the courtroom and
23 proceeded with the hearing. Id. at 69-70.

24 In an abundance of caution, the court arranged to have
25 Petitioner returned to the courtroom prior to the commencement of
26 trial to verify whether he wished to be present for the trial, but
27 Petitioner refused to exit the holding cell. Id. at 81-85. After
28 some discussion, the judge decided to ask the bailiffs to forcibly

1 transport Petitioner to court so the judge could again advise
2 Petitioner of his constitutional rights, including the right to be
3 present during his trial. Id. at 85-88. Petitioner apparently then
4 decided to return to court voluntarily. Id. at 88. The judge
5 advised Petitioner that he had the right to be present for his jury
6 trial and to be dressed in non-jail clothing, but that he would have
7 to conduct himself in a respectful manner. Id. at 90-92.
8 Petitioner refused to answer any of the judge's questions but, in
9 response to the question of whether he wished to talk to his
10 attorney, Petitioner "flipped his attorney the bird." Id. at 92-94.
11 The trial then proceeded without Petitioner's presence. Lodgments
12 7-8.

13 2. Written Consent

14 Petitioner's first argument is that the court violated his
15 rights by forcing him to be represented by an appointed attorney
16 when Petitioner had not provided written consent for the
17 representation. Pet. at 6. In support of his argument, Petitioner
18 cites to the Rules of Professional Conduct of the California State
19 Bar. Id. This argument is not cognizable on federal review.

20 When conducting habeas review, a federal court is limited to
21 "deciding whether a conviction violated the Constitution, laws or
22 treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 68
23 (1991); 28 U.S.C. § 2254 (§ 2254 habeas review only available "on
24 the ground that [a petitioner] is in custody in violation of the
25 Constitution or laws or treaties of the United States"). Habeas
26 relief is not available for an alleged error in the interpretation
27 or application of state law. Estelle, 502 U.S. at 67-69. This
28 Court is therefore precluded from considering Petitioner's claim

arising from an alleged violation of the California Rules of Professional Conduct.⁴ See Little v. Crawford, 449 F.3d 1075, 1082 (9th Cir. 2006) (contention that state court violated state law by failing to inform petitioner of probation term is not cognizable on federal review); Beaty v. Stewart, 303 F.3d 975, 986 (9th Cir. 2002) (claim that state court improperly applied state sentencing law not federally cognizable).

3. Right To Counsel of Choice

Petitioner's next argument is that his constitutional rights were violated because he was denied his right to be represented by an attorney of his choice. Pet. at 6-8; Traverse at 2-5.

The Sixth Amendment guarantees a criminal defendant the right to be represented by effective trial counsel. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932); Strickland v. Washington, 466 U.S. 668 (1984). As part of this right, a defendant has a qualified right to choose his preferred trial counsel. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989). If, however, a defendant does not have the financial ability to hire an attorney and therefore requires the appointment of counsel, the defendant does not have a right to be represented by *appointed* counsel of his choice. Id. ("[A] defendant may not insist on representation by an attorney he cannot afford.") (quoting Wheat v. United States, 486 U.S. 153, 159 (1988)); United States v. Gonzalez-Lopez, 548 U.S.

⁴ To the extent that Petitioner may be trying to argue that the lack of written consent violates his Sixth Amendment or other constitutional rights, he fails to provide any legal support for his argument. Moreover, the Court is not aware of any constitutional provision or clearly established Federal law requiring a criminal defendant to agree in writing to his legal representation. Carey v. Musladin, 549 U.S. 70, 127 S.Ct. 649, 653 (2006) (AEDPA requires an analysis of whether the state court's ruling was contrary to, or an unreasonable application of, a decision of the United States Supreme Court).

1 140, 151 (2006) ("[T]he right to counsel of choice does not extend
2 to defendants who require counsel to be appointed for them.").
3 Similarly, while a defendant has a right to be represented by
4 competent counsel, he does not have a right to a "meaningful
5 attorney-client relationship." Morris v. Slappy, 461 U.S. 1, 13
6 (1983).

7 Here, the record reflects that Petitioner did not hire an
8 attorney, did not seek to substitute in a retained attorney, and did
9 not indicate that he had the financial ability to hire his own
10 lawyer. Pet. at 9-12; Lodgment 5 at 1-13; Lodgment 6 at 54-70.
11 Rather, Petitioner repeatedly objected to the appointed attorney and
12 demanded a new free attorney. Id. Because there is no evidence
13 that Petitioner had the financial resources to retain a lawyer or
14 that he had identified a lawyer who was willing to represent him,
15 Petitioner required the appointment of counsel and therefore did not
16 have the right to choose his lawyer. Caplin & Drysdale, 491 U.S. at
17 624; see also Gonzalez v. Knowles, 515 F.3d 1006, 1013 (9th Cir.
18 2008) (no violation of right to counsel where trial court declined
19 to appoint attorney requested by defendant and who was available and
20 willing to represent defendant). Accordingly, the trial judge did
21 not violate Petitioner's constitutional rights by rejecting his
22 request to dictate the attorney to be provided to him at the
23 government's expense.

24 Petitioner also argues that the trial court violated his
25 constitutional rights by denying his request to continue the
26 preliminary hearing and trial in order to provide him additional
27
28

1 time to obtain counsel.⁵ The United States Supreme Court recently
2 reiterated that a trial court retains "wide latitude in balancing
3 the right to counsel of choice against the needs of fairness, and
4 against the demands of its calendar." Gonzalez-Lopez, 548 U.S. at
5 152; see also Miller v. Blacketter, 525 F.3d 890, 895 (9th Cir.
6 2008). "As such, trial courts retain the discretion to 'make
7 scheduling and other decisions that effectively exclude a
8 defendant's first choice of counsel.'" Miller, 525 F.3d at 895,
9 quoting Gonzalez-Lopez, 548 U.S. at 152.

10 In evaluating a similar habeas claim, the Ninth Circuit
11 considered three factors: whether the defendant had retained new
12 counsel, whether current counsel was prepared and competent to
13 proceed forward, and the timing of defendant's request to continue.
14 Miller, 525 F.3d at 896-98. In Miller, the court denied a habeas
15 petition alleging a violation of the right to counsel where the
16 petitioner requested the continuance the morning that trial was
17 scheduled to begin, petitioner had not yet retained a lawyer, and
18 his appointed lawyer was prepared to represent him. Id. The same
19 analysis dictates the same result in this case.

20 In the instant case, as in Miller, Petitioner had not
21 retained new counsel at the time he requested the continuances.
22 During the hearing on April 3, 2006, Petitioner told the judge that
23 he had not taken any affirmative action to retain a lawyer and that
24 he was requesting the continuance so that he could continue to look

25
26 ⁵ While the record does not establish that Petitioner requested a
27 continuance of his trial to obtain a new lawyer, it does reflect that he
28 allegedly submitted a written request and that he wanted a new lawyer. Lodgment
6 at 54-56. Because he did not identify a specific lawyer who was ready to
proceed, a new lawyer, whether appointed or retained, would require a continuance
of the trial.

1 into the possibility of hiring an attorney. Lodgment 1 at 95; Pet.
2 at 11. Petitioner confirmed these facts on April 5, 2006, when he
3 again requested a continuance before the start of the preliminary
4 hearing. Lodgment 5 at 1-4. And, on the morning of trial,
5 Petitioner requested a referral to the "indigent panel," indicating
6 that he still had not retained a lawyer. Lodgment 6 at 54-56.
7 Accordingly, there is no evidence that Petitioner had hired a new
8 attorney who was willing and able to proceed with the hearing or
9 trial.

10 Similarly, in both the instant case and Miller, the existing,
11 appointed lawyer was ready and able to represent the defendant.
12 Although Petitioner argued that his lawyer was not prepared to
13 represent him⁶ (Lodgment 6 at 57-58), the appointed lawyer explained
14 their relationship and his preparation and stated that he was
15 prepared to represent Petitioner at trial (id. at 58-60). Further,
16 Petitioner repeatedly told the judge that he did not have an
17 objection to the individual lawyer appointed to represent him or any
18 specific aspect of his representation; rather, he stated that his
19 objection was to any court-appointed lawyer because there was an
20 "automatic conflict of interest" when the government that is
21 prosecuting him also is paying his lawyer. Pet. at 10-12; Lodgment
22 5 at 1-4; Lodgment 6 at 57-58, 61.

23 Finally, Petitioner requested the continuances two days
24 before the preliminary hearing, the morning of the preliminary
25 hearing, and the morning of trial. Pet. at 9-12; Lodgments 5 and 6.
26 Significantly, Petitioner had approximately two months between the

27
28 ⁶ Notably, Petitioner is not alleging ineffective assistance of counsel
in his federal habeas petition. Pet.; Traverse.

1 preliminary hearing and the trial and yet he did not retain a
2 lawyer. Rather, he waited until the morning of trial to again
3 request new counsel. Lodgement 6 at 54-56. Petitioner does not
4 provide any justification for the timing of his requests, other than
5 to reiterate his erroneous belief that there is an inherent conflict
6 with any court-appointed attorney representation and that he
7 therefore has a right to a new, free attorney obtained from some
8 other source. Lodgments 5 and 6. Accordingly, Petitioner has not
9 provided any justification for his late requests. Miller, 525 F.3d
10 at 897-98 (court properly considers timing of request and the
11 justification, if any, for a late request).

12 "[O]nly [a trial court's] unreasonable and arbitrary
13 'insistence upon expeditiousness in the face of a justifiable
14 request for delay violates the Sixth Amendment." Miller, 525 F.3d
15 at 897, quoting Morris, 461 U.S. at 11-12. Given all of the facts
16 of this case, the Court finds that the judges' decisions to deny
17 Petitioner's requests to continue the hearings and trial were
18 neither arbitrary nor unreasonable, that Petitioner's requests were
19 not justifiable, and that the judges did not abuse their discretion
20 by denying Petitioner's requests to continue the preliminary hearing
21 and trial. Morris, 461 U.S. at 12-14 (defendant's Sixth Amendment
22 rights not violated when trial court refused to continue trial to
23 permit defendant's preferred public defender to represent him);
24 Miller, 525 F.3d at 895-98 (no violation of right to counsel where
25 trial court denied continuance requested morning of trial and new
26 counsel had not yet been retained); Bradley v. Henry, 510 F.3d 1093,
27 1100 (9th Cir. 2007) (trial court "may deny motion to substitute
28 retained counsel if there is a substantial risk that the delay will

1 result in an undue delay of the proceedings").

2 **3. Alleged Conflict with Counsel**

3 Finally, Petitioner argues that the trial court violated his
4 constitutional rights by refusing to appoint a new attorney to
5 represent him when there was an inherent conflict and/or an
6 "apparent lack of communication" between Petitioner and his
7 appointed attorney. Pet. at 6-8.

8 The Sixth Amendment provides a defendant with the right to be
9 represented by an attorney who does not have an actual conflict of
10 interest. See Holloway v. Arkansas, 435 U.S. 475, 483-84 (1978)
11 (representation by one attorney of several defendants violates the
12 Sixth Amendment if it presents an actual conflict of interest). If
13 a defendant raises an actual conflict issue, or the judge knows or
14 reasonably should know of such a conflict, the judge has a duty to
15 inquire into the details of the conflict. Lockhart v. Terhune, 250
16 F.3d 1223, 1229-30 (9th Cir. 2001) (summarizing Supreme Court
17 decisions). Similarly, if a defendant requests a new attorney on
18 the grounds that he has a conflict with his attorney that prevents
19 him from receiving his constitutionally-protected representation,
20 the Sixth Amendment requires that the trial court conduct an
21 "appropriate inquiry" into the allegations before the case proceeds.
22 Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000); Plumlee v.
23 Masto, 512 F.3d 1204, 1211 (9th Cir. 2008) (same).

24 Here, Petitioner has not established that his lawyer had an
25 actual conflict of interest. Counsel did not represent more than
26 one defendant and there is no evidence that counsel previously
27 represented another client whose representation conflicted with his
28 representation of Petitioner. Similarly, there is no evidence that

1 any aspect of the individual lawyer created an actual conflict.
2 Plumlee, 512 F.3d at 1210 (issue is whether there is an actual,
3 legal conflict). Moreover, Petitioner repeatedly advised the court
4 that the alleged conflict was not an actual one involving his
5 individual attorney, but one inherent in a system where the court
6 selects and appoints the defense lawyer and government money pays
7 the salaries of both prosecutors and defense lawyers. Pet. at 9-12;
8 Lodgments 5 and 6.

9 To the extent that Petitioner is arguing that his distrust of
10 his attorney created a conflict requiring the appointment of new
11 counsel, the law does not support his argument. In Morris, 461 U.S.
12 at 13-14, the Supreme Court held that the Sixth Amendment did not
13 guarantee "a meaningful relationship between an accused and his
14 counsel." In interpreting this holding, the Ninth Circuit recently
15 rejected a similar habeas petitioner's argument, finding no
16 constitutional violation where the Petitioner was "represented by a
17 lawyer free of actual conflicts of interest, but with whom the
18 defendant refuses to cooperate because of dislike or distrust."
19 Plumlee, 512 F.3d at 1211. Accordingly, Petitioner's argument that
20 he was entitled to a new attorney because he did not trust his
21 appointed lawyer due to the manner in which he was appointed and
22 paid does not constitute a violation of the Sixth Amendment or any
23 other constitutional right.

24 Finally, the court did conduct appropriate inquiries into
25 Petitioner's conflict allegations. In both April and June of 2006,
26 when Petitioner raised this issue, the presiding judge immediately
27 excluded the prosecutor and conducted an *in camera*, *ex parte* inquiry
28 into Petitioner's allegations. Pet. at 9-12; Lodgment 6 at 54-69.

1 The judges specifically asked Petitioner whether he objected to the
2 actual representation that he was receiving from his appointed
3 lawyer. Pet. at 10-11; Lodgment 6 at 58-61. In April, Petitioner
4 confirmed that the alleged conflict involved any lawyer appointed
5 and paid by the government, and not the individual appointed PCC
6 lawyer. Pet. at 10-11. In June, the judge solicited Petitioner's
7 complaints against the individual lawyer and permitted the lawyer to
8 explain his conduct. Lodgment 6 at 58-60. The judge then opined
9 that Petitioner's real dispute appeared to be with any lawyer
10 appointed and paid by the government, and not the conduct of his
11 currently-appointed lawyer. Id. at 60-61. Petitioner confirmed
12 that the court's opinion was correct. Id. at 61. Once the trial
13 judge determined that Petitioner's alleged conflict was one inherent
14 in the system, that Petitioner objected to being represented by an
15 attorney who is paid by the same government that was prosecuting
16 him, the judge expended considerable time and effort to explain the
17 system to Petitioner and to assure him that the system could provide
18 him with competent counsel and that there was not an inherent
19 conflict. Id. at 61-68.

20 However, Petitioner rebuffed the judge's efforts, became
21 verbally abusive, and demanded to be removed from the courtroom.
22 Id. at 65-69. Accordingly, the record establishes that the state
23 court judges complied with the law by considering Petitioner's
24 conflict claims, conducting an immediate and appropriate inquiry,
25 and properly determining that there was no conflict in counsel's
26 representation of Petitioner that required the appointment of a new
27 lawyer. King v. Rowland, 977 F.2d 1354, 1357 (9th Cir. 1992) (no
28 constitutional violation where trial court briefly inquired into

1 basis for request for appointment of counsel and then denied it).

2 For the reasons set forth above, the Court finds that the
3 California Supreme Court's denial of Petitioner's claim that his
4 constitutional right to counsel of choice was violated was not
5 contrary to, or an unreasonable application of, clearly established
6 Federal law. This Court therefore **RECOMMENDS** that Petitioner's
7 claim for habeas relief be **DENIED**.

8 **CONCLUSION AND RECOMMENDATION**

9 In sum, this Court finds that Petitioner has failed to
10 present any evidence suggesting that the California Supreme Court's
11 decision was contrary to, or an unreasonable application of, clearly
12 established federal law. See 28 U.S.C. § 2254(d). Nor has
13 Petitioner made any supported argument that further factual
14 development is necessary, such that an evidentiary hearing would be
15 warranted. See 28 U.S.C. § 2254(e)(2) (exceptions where an
16 evidentiary hearing may be appropriate). As such, this Court
17 **RECOMMENDS** that Petitioner's Petition for Writ of Habeas Corpus be
18 **DENIED** and the case dismissed with prejudice.

19 For all the foregoing reasons, **IT IS RECOMMENDED** that the
20 District Court issue an Order: (1) approving and adopting this
21 Report and Recommendation and (2) directing that Judgment be entered
22 denying the Petition.

23 **IT IS HEREBY ORDERED** that any written objections to this
24 Report must be filed with the Court and served on all parties **no**
25 **later than August 15, 2008**. The document should be captioned
26 "Objections to Report and Recommendation."

27 **IT IS FURTHER ORDERED** that any reply to the objections shall
28 be filed with the Court and served on all parties **no later than**

1 September 5, 2008. The parties are advised that failure to file
2 objections within the specified time may waive the right to raise
3 those objections on appeal of the Court's order. See Turner v.
4 Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

5
6 DATED: July 25, 2008

7 

8 BARBARA L. MAJOR
9 United States Magistrate Judge

10
11 COPY TO:

12 HONORABLE IRMA E. GONZALEZ
13 UNITED STATES DISTRICT JUDGE

14 ALL COUNSEL
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